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Supreme Court, U.S.
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No. 97-1669

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CASSAN ENTERPRISES, INC., ET AL.,
Petitioners,

v.

DOLLAR SYSTEMS, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower courts properly determine that application of Washington State's Franchise Investment Protection Act to the contract between Dollar and Cassan would impair Dollar's contractual rights in violation of the Contract Clause of the U. S. Constitution?

PARTIES TO THE PROCEEDINGS

Dollar adopts Cassan's statement on page ii of the Petition, as to the petitioners only.

Respondents Dollar Systems, Inc. and Dollar Rent A Car Systems, Inc. have merged and are currently known as Dollar Rent A Car Systems, Inc. ("Dollar"). Dollar is a wholly-owned subsidiary of Respondent Dollar Thrifty Automotive Group, Inc., formerly known as Pentastar Transportation Group, Inc. ("Pentastar"). Since December 1997, Dollar Thrifty Automotive Group, Inc. has been a publicly traded company and is no longer a subsidiary of Chrysler Corporation.

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BRIEF IN OPPOSITION TO
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I. STATEMENT OF THE CASE

This garden variety diversity case involves a commercial dispute between respondent Dollar Rent A Car Systems, Inc. (Dollar), a nationwide car rental company, and petitioners Cassan Enterprises, Inc., and CMC Investments, Inc. (Cassan), franchisees of Dollar. In 1993 Cassan filed an action in Washington State court alleging a variety of tort and breach of contract claims, as well as claims arising under two Washington state statutes, the Washington Consumer Protection Act and the Washington Franchise Investor Protection Act (FIPA). Cassan sought both damages and equitable relief. The case was removed to federal court.

Cassan's claims fell into two categories. First, it contended that Dollar wrongfully failed to offer financial assistance to Cassan in connection with Cassan's bid for a

concession at Sea-Tac Airport in Washington. Cassan demanded financial assistance of up to one-half of the monthly franchise fee that its Seattle operation was obligated to pay Dollar under the Franchise Agreement. Second, Cassan claimed that Dollar wrongfully refused to allow Cassan to accept an advertising allowance from GM, which was conditioned upon Cassan's advertising GM vehicles. Dollar had a policy that if vehicles were featured in advertisements, they had to be Chrysler vehicles. At the time Dollar was owned by Chrysler Corporation, which was also its featured fleet provider. Dollar refused to make an exception to this policy for Cassan.

Of relevance to the petition filed by Cassan, FIPA, generally prohibits franchisors from "discriminat[ing] between franchises in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing," unless the discrimination is 1) "reasonable," or 2) "based on franchises granted at materially different times" and the discrimination is "reasonably related" to that difference in time, or 3) is "not arbitrary." Wash. Rev. Code 19.100.180(1)(c) (1996). Cassan claimed that Dollar had discriminated against Cassan because Dollar had provided financial assistance to some franchisees seeking airport concessions and had allowed some franchisees to accept GM advertising allowances, while denying similar benefits to Cassan. Dollar denied these allegations.

The district court granted Dollar's summary judgment motion on the FIPA claim on the ground that application of the Act, which became law in 1972, to the Dollar-Cassan contract, which was entered into five years earlier, would violate the Contract Clause of the Washington State Constitution and of the United States Constitution, art. I, §10.

The other claims went to trial, and a jury found in favor of Cassan in the amount of $8.7 million. The court entered two injunctions against Dollar.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed in every respect. It granted judgment to Dollar as a matter of law on all legal claims, vacated the one injunction, and remanded the other injunction for further determinations.[1] In addition, it affirmed the grant of summary judgment in favor of Dollar with respect to the Contract Clause, holding that retroactive application of FIPA would indeed violate that provision.

In this Court, Cassan seeks review only of the Ninth Circuit holding that application of FIPA in this case would violate the Contract Clause.

II. REASONS FOR DENYING THE WRIT

This case involves no conflict among the courts of appeals or with precedent of this Court. It breaks no new legal or constitutional ground. And it bears no national significance. The issue was decided correctly by both the district court and the court of appeals in accordance, as Petitioners concede, Pet. at 7-8, with virtually all courts that have looked at this or similar legislation.

Although not every state law affecting contracts violates the Contract Clause, that provision "is not a dead letter," *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978), and protects the legitimate, reasonable expectations of parties to a contract. The "threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves*

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[1] That injunction is still pending in the district court.

Group, Inc., v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983), *quoting Spannaus* 438 U.S. at 244.

If the impairment is substantial, the second inquiry is whether the state has a "significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 412-13 (citation omitted); *see Spannaus*, 438 U.S. at 249 (legislation at issue "was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's. . .").

In this case, the courts below properly found both that the impairment wrought by FIPA was severe and that the legislation did not address a broad and general social or economic problem. They are right on both counts. FIPA is special interest legislation which, if applied retroactively, would alter fundamental contract rights, such as Dollar's right to collect its franchise fee and its right to control its trademarks.

Although Petitioners tellingly do not address the seriousness of the contractual impairment that FIPA would cause in this case, it can hardly be gainsaid. First, if Dollar were required by FIPA to provide Cassan financial assistance in connection with Cassan's bid for a concession at Sea-Tac Airport, this obligation would materially change the franchise fees payable by Cassan to Dollar set forth in the franchise agreement. Similarly, if Dollar were required by FIPA to allow Cassan to accept an advertising allowance from GM conditioned upon featuring GM vehicles in Cassan's advertisements, this obligation would materially alter the contractual provision that allows Dollar to approve use of its logo in all advertising.

These changes would not constitute mere tinkering at the margins of the Dollar-Cassan agreement; they address, rather, core contractual issues. These "severe" and "permanent" changes, as the district court observed, would have "substantially impair[ed] Dollar's contractual rights because [they] would alter the reasonable expectations of the parties." A-14-15. These rights and expectations, moreover, were the result of "bargaining by the parties; and throughout the years since the contract was signed, the parties appear to have relied upon [their] terms." A-15. The courts below were thus clearly right that FIPA would operate as a substantial impairment of the contractual relationship between Dollar and Cassan.

With respect to the second part of the *Spannaus-Energy Reserves Group* test, the courts below were also correct in ruling that FIPA addressed only a "narrow class, not a general or broad societal problem. . .." A-14 (district court) and that retroactive application of FIPA was "insufficiently justified," A-10 (court of appeals). On its face, this statute clearly benefits only a special interest group, franchisees, and does not have as its purpose "the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 411-12 (citation omitted). Thus, FIPA is akin to the pension funding charge that applied only to Minnesota employers that was struck down in *Spannaus* and is far different from the Kansas act that imposed price controls on natural gas that was upheld in *Energy Reserves Group*.[2]

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[2] The *Energy Reserves Group* Court found it significant that the natural gas industry is "heavily regulated," 459 U.S. at 413, presumably because parties to a contract in a heavily regulated industry must reasonably expect that contractual terms may be altered by laws or regulations. By contrast, Washington

FIPA did not impose "a generally applicable rule of conduct designed to advance 'a broad societal interest'. . ." but instead "directly 'adjusted the rights and responsibilities of contracting parties.' " *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983) (citation omitted). The "overall purpose of the Act is specifically to adjust the balance of power between contracting parties." *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 608 (S.D. Iowa 1993), *aff'd sub nom., Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 353 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994).

In sum, the courts below properly held that retroactive application of FIPA would violate the Contract Clause. The proof of this particular proposition lies in the fact, as acknowledged by Petitioners, that virtually every court (and every court of appeals) that has examined special interest statutes like FIPA has found them to be severe and unconstitutional impairments of contracts.[3] Indeed, the very

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State "had not previously regulated franchises in this manner. . .." A.14-15.

[3]*See, e.g., Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994); *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041, 1043 (5th Cir. 1990); *Morgan v. Kemper Ins. Co.*, 754 F.2d 145, 147-48 (4th Cir. 1985); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1005-07 (4th Cir. 1980); *Fornaris v. Ridge Tool Co.*, 423 F.2d 563 (1st Cir.), *rev'd on other grounds*, 400 U.S. 41 (1970)(resolution of constitutional question should have been deferred to see if Puerto Rico court might construe statute in a way avoiding that question); *Mankaro Implement Inc. v. J.I. Case Co.*, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9947 (D. Minn. 1991); *Larco Distrib. Inc. v. Latrobe Brewing Co.*, 1990 WL 168702 (D. Kan. 1990), *Rochester v. Royal Appl. Mfg. Co.*, 569 F. Supp. 736 (W.D. Wis. 1983); *Superior Motors, Inc. v. Winnebago Indus., Inc.*, 359 F.Supp. 773, 779 (D.S.C. 1973);

provision at issue in this case was found to violate the federal Contract Clause if applied retroactively in *Chico's Pizza Franchises, Inc. v. Sisemore* 544 F. Supp. 248, 250 (E.D. Wash. 1981), *aff'd*, 685 F.2d 440 (9th Cir. 1982). ("[T]he conclusion is inescapable that FIPA profoundly altered, to the point of potential obliteration, the reasonable expectations of the parties").

Petitioner is simply unhappy with the state of the law, as it has been almost uniformly developed by federal and state courts, because it would like to see circumstances that better favor franchisees. That does not make out a basis for this Court's review. Petitioner fails to show any inconsistency between the case below and recent Contract Clause decisions in the federal courts of appeals. Nor can it distinguish such cases. In short, this private dispute between franchisor and franchisee over a reduction in the franchise fee and advertising restrictions implicates no "general or broad societal problem" that justifies retroactive application of FIPA. To the contrary, retroactivity would seriously interfere

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Shell v. Metropolitan Life Ins. Co., 380 S.E.2d 183, 188-91 (W.Va. 1989); *Heublein, Inc. v. Department of Alcoholic Bev. Control*, 376 S.E. 2d 77, 79 (Va. 1989); *Birkenwald Distrib. Co. v. Heublein, Inc.*, 776 P.2d 721, 724-25 (Wash.Ct.App. 1989); *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872-74 (Minn. 1986), *cert. denied*, 479 U.S. 1060 (1987), *Fireside Chrysler-Plymouth Mazda, Inc. v. Chrysler Corp.*, 472 N.E.2d 861, 866 (Ill. App. Ct. 1984); *G-H Ins. Agency, Inc. v. Continental Ins. Co.*, 294 S.E.2d 336 (S.C. 1982); *Martino v. McDonald's Corp.*, 304 N.W.2d 780 (Wis. 1981); *Wipperfurth v. U-Haul Co.*, 304 N.W.2d 767, 773 (Wis. 1981); *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681 (Fla. 1980); *Smith Ins., Inc. Co. v. Grievance Comm.*, 424 A.2d 816, 820 (N.H. 1980); *Ward v. Chevron U.S.A., Inc.*, 598 P.2d 1027 (Ariz. 1979); *Globe Liquor Co. v. Four Horses Distillers Co.*, 281 A.2d 19 (Del.), *cert. denied*, 404 U.S. 873 (1971)

with private commercial obligations in a fashion that the Contract Clause was intended to prevent.

III. CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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